United States Court of Appeals

for the Second Circuit

APPELLEE'S SUPPLEMENTAL BRIEF

74-1327

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 74-1327, 74-1328, 74-1339, 74-1499

UNITED STATES OF AMERICA,

Appellee,

—v.—

BENJAMIN MALLAH, VINCENT PACELLI, JR., ALFRED CATINO and BARNEY BARRETT,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

SUPPLEMENTAL BRIEF FOR THE UNITED STATES OF AMERICA

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Pursuant to the permission of the Court granted at oral argument on June 21, 1974, the Government submits this brief in response to the arguments set forth in Point One of the brief of appellant Vincent Pacelli, Jr.

ARGUMENT

Pacelli's conviction on the instant indictment does not constitute double jeopardy nor was he denied due process or a speedy trial.

Pacelli argues that his conviction in this case should be reversed because it violates the double jeopardy and due process provisions of the Fifth Amendment, the speedy trial guarantee of the Sixth Amendment and is contrary to fundamental fairness and efficient judicial administration. None of these claims have merit.

I. The Conspiracy Count

Pacelli claims that the conspiracy count of Indictment 71 Cr. 614, on which he was previously convicted, and the conspiracy count of the present indictment (73 Cr. 881) charged him with the same offense and that the latter conviction placed him twice in jeopardy in violation of the Fifth Amendment. However, the conspiracy charged in each of these indictments constituted different crimes.

a. Indictment 71 Cr. 614

Indictment 71 Cr. 614, filed on June 14, 1971, charged Pacelli, Demetrios Papadakos, a/k/a James Pappas, Beverly Jalaba and Elisa Possas in count one with conspiracy to violate the federal narcotics laws from January 1, 1971 to June 14, 1971. The overt acts alleged were as follows:

1. On or about May 3, 1971 Elisa Possas delivered approximately ⅛ kilogram of cocaine at 425 East 63rd Street.
2. On or about May 20, 1971 Elisa Possas had a telephone conversation with Vincent Pacelli.
3. On or about May 20, 1971 Elisa Possas delivered approximately ½ kilogram of heroin to John Lepore.
4. On or about May 21, 1971 Vincent Pacelli walked to 370 East 76th Street, New York, New York.

Pacelli and Possas were charged in count two with distributing approximately 110.13 grams of cocaine on May 3, 1971. Count three charged Pacelli, Possas and Papadakos with distributing 473 grams of heroin from May 10, 1971 to May 20, 1971. Pacelli and Jalaba were charged in count four with possessing with the intent to distribute 11.83 grams of cocaine on May 21, 1971. Count five charged Pacelli with using a telephone to facilitate the commis-

sion of the offense alleged in count three of the indictment (Pacelli App. 86-88).*

b. Indictment 73 Cr. 881

The indictment on which Pacelli was convicted below charged him and twelve co-defendants with conspiring to violate the federal narcotics laws from January 1, 1971 to September 23, 1973, the date of the filing of the indictment. Herbert Sperling, Joseph Conforti, Louis Mileto and Barry Lipsky were named in the indictment as co-conspirators but not as defendants (Pacelli App. 115-116). In addition, twenty-eight additional co-conspirators were named in the Government's Bill of Particulars (Pacelli App. 7-10).

The overt acts alleged in Indictment 73 Cr. 881 are as follows:

1. In or about July, 1971 the defendant Edgardo Ramirez delivered two cans of lactose to 1420 Third Avenue, New York, New York.

2. In or about November, 1971 co-conspirator Herbert Sperling delivered to defendant Vincent Pacelli, Jr. two kilograms of heroin.

3. In or about September, 1971 the defendant Vincent Pacelli, Jr. delivered approximately two kilograms of heroin to defendants Alfred Catino, a/k/a "Herbie" and John Fazzalari, a/k/a "Fuzzy".

4. In or about the month of December, 1971, the defendant Vincent Pacelli, Jr. delivered one kilogram of cocaine to the defendant Alfred De Franco, a/k/a "Skinny" and John Fazzalari, a/k/a "Fuzzy".

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* Pacelli's conviction on indictment 71 Cr. 614 was affirmed in *United States* v. *Pacelli*, 470 F.2d 67 (2d Cir. 1972), *cert. denied*, 410 U.S. 983 (1973).

5. On or about August 16, 1972 the defendant Benjamin Mallah had a conversation with co-conspirator Herbert Sperling in front of 844 Seventh Avenue, New York, New York.

6. In or about the month of December, 1972 the defendant Barney Barrett was in the vicinity of 844 Seventh Avenue, New York, New York.

7. On or about January 10, 1973, the defendant Jack Spada had in his possession approximately two and one-half kilograms of heroin (Pacelli App. 116-117).

Except for Pacelli, there were no conspirators common to Indictments 71 Cr. 614 and 73 Cr. 881 and completely different overt acts were alleged in each indictment. All of the overt acts in the earlier indictment occurred in May, 1971, whereas none of the overt acts alleged in Indictment 73 Cr. 881 took place before June, 1971. Furthermore, the proof at the earlier trial showed that Pacelli and Papadakos "were partners in a heroin distributing ring which supplied customers from Chicago and Detroit." *United States* v. *Pacelli, supra*, 470 F.2d at 68 n. 2. In the instant prosecution there was no evidence that sales of narcotics extended to those cities. Finally, the conspiracy alleged in Indictment 71 Cr. 614 terminated with the arrest of the conspirators in May, 1971, whereas the conspiracy proved below continued during 1972 and 1973 and Pacelli's active participation therein lasted until February, 1972.

The applicable rule was stated by this Court in *United States* v. *Kramer*, 289 F.2d 909, 913 (2d Cir. 1961):

> "Offenses are not the same for purposes of the double jeopardy clause simply because they arise out of the same general course of criminal conduct; they are the 'same' only when 'the evidence required to support a conviction upon one of them [the indictments] would have been sufficient to warrant a conviction upon the other.'"

Here it is indisputable that the evidence presented at the trial of Indictment 71 Cr. 614 would not have supported a conviction under Indictment 73 Cr. 881. Nor would the evidence adduced at the trial below have supported a conviction under the earlier indictment. Offenses for the purpose of double jeopardy must be the same in law and in fact, *Dryden* v. *United States*, 403 F.2d 1008, 1009 (5th Cir. 1968), and the record clearly demonstrates that such is not the case here. *United States* v. *Pacelli*, 470 F.2d 67, 72 (2d Cir. 1972), *cert. denied*, 410 U.S. 983 (1973); *United States* v. *McCall*, 489 F.2d 359, 361-363 (2d Cir. 1973); *United States* v. *Barzie*, 433 F.2d 984 (2d Cir. 1970), *cert. denied*, 401 U.S. 975 (1971); *Ferracane* v. *United States*, 29 F.2d 691, 692-693 (7th Cir. 1928); *Henry* v. *United States*, 15 F.2d 365 (1st Cir. 1926).

1. Collateral Estoppel

Pacelli claims that the Government was barred from prosecuting him on the conspiracy count in Indictment 73 Cr. 881 because Judge Gagliardi, with the consent of the Government, had previously dismissed the conspiracy count of Indictment 72 Cr. 612 on grounds of double jeopardy. The argument lacks merit.

a. Indictment 72 Cr. 664

On June 5, 1972, Indictment 72 Cr. 664 was filed charging Pacelli, Luis Valentine, a/k/a Ramon Lombardero, Barry Lipsky, Octavio del Busto, Nelson Garcia, and Rafael Rojas in count one with conspiracy to violate the federal narcotics laws during the period from September 28, 1971 to June 5, 1972. The overt acts alleged in that indictment were as follows:

1. On or about September 28, 1971, defendants Vincent Pacelli, Jr., Luis Valentine and Barry Lipsky met at Yellowfingers Cafe, 1009 Third Avenue, New York, New York.

2. On or about October 18, 1971 defendants Luis Valentine, Octavio del Busto, Nelson Garcia, Rafael Rojas and co-conspirator Alberto Gonzalez went to the vicinity of the Castillian Room Bar, 303 East 56th Street, New York, New York.

Count two charged Pacelli, Valentine and Lipsky with distributing an unspecified amount of cocaine on September 28, 1971. Count three charged Valentine, del Busto, Garcia and Rojas with distributing 303.5 grams of cocaine on October 18, 1971. Count four charged del Busto, Garcia and Rojas with carrying a gun during commission of the felony on October 18, 1971 (Pacelli App. 93-95).

On June 14, 1972, after a trial before the Honorable Lee P. Gagliardi, United States District Judge, and a jury, Pacelli was convicted on count one, the conspiracy count, and count two. The other defendants were convicted on all counts in which they were named except that Garcia was acquitted on count four. On July 25, 1972, Judge Gagliardi sentenced Pacelli to 15 years imprisonment on counts one and two. The sentences were to run concurrently, but consecutive to the twenty year term of imprisonment which Pacelli received upon his conviction on Indictment 71 Cr. 614.

b. Indictment 72 Cr. 612

Indictment 72 Cr. 612, filed on May 18, 1972, charged Pacelli, Peter Aponte, Barry Lipsky, Nicholas Lugo and Albert Perez, a/k/a Albert Rodriguiez, a/k/a Abbe, in count one with conspiracy to violate the federal narcotics laws from September 1, 1971 to May 18, 1972. The overt acts alleged in count one were as follows:

1. In or about October, 1971, Vincent Pacelli, Jr. and Barry Lipsky met at the Yellowfingers Cafe, 1009 Third Avenue, New York, New York.

2. In or about October, 1971, Barry Lipsky delivered a quantity of cocaine to Nicholas Lugo.

3. On November 18, 1971, Peter Aponte, Nicholas Lugo and Albert Perez met at L & A Sporting Goods, 2147 Third Avenue, New York, New York.

4. On November 18, 1971, Peter Aponte delivered a quantity of cocaine to Special Agent Joseph Salvemini.

5. On or about November 18, 1971, Vincent Pacelli, Jr. met Barry Lipsky.

6. On November 29, 1971, Nicholas Lugo and Peter Aponte met with Special Agent Joseph Salvemini at L & A Sporting Goods, 2147 Third Avenue, New York, New York.

Count two charged Pacelli, Lipsky and Lugo with distributing an unknown amount of cocaine in or about October, 1971. Count three charged Aponte, Lugo and Perez with distributing 121.7 grams of cocaine on November 18, 1971 * (Pacelli App. 89-91).

c. Indictment 72 Cr. 1319

On December 4, 1972 Indictment 72 Cr. 612 was superseded by Indictment 72 Cr. 1319. The latter indictment charged the identical crimes alleged in Indictment 72 Cr. 612, but Pacelli and Lipsky were not named as defendants in count one, the conspiracy count. The overt acts alleged were as follows:

1. On November 18, 1971, Peter Aponte delivered a quantity of cocaine to Joseph Salvemini, an undercover agent, in L & A Sporting Goods, 2147 Third Avenue, New York, New York.

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* Pacelli never went to trial on this Indictment and an order of nolle prosequi was filed as to all defendants on May 25, 1973 (Pacelli App. 92).

2. On November 18, 1971 Albert Perez entered an inner room of L & A Sporting Goods.

3. On November 18, 1971 Nicholas Lugo had a conversation with Joseph Salvemini, an undercover agent, in L & A Sporting Goods.

4. On November 29, 1971, Nicholas Lugo and Peter Aponte met with Joseph Salvemini, an undercover agent, at L & A Sporting Goods.

Pacelli's trial on Indictment 72 Cr. 1319 commenced before Judge Gagliardi on December 18, 1972. On December 21, 1972, after a jury had been sworn and evidence heard, Pacelli moved for a mistrial which was granted with the consent of the Government * (Pacelli App. 121-126).

As a result of the disclosure of Lipsky's untruthfulness at the trial of Indictment 72 Cr. 664, the Government requested that this Court remand the case, then pending on appeal, to the District Court for further proceedings. Upon remand, Pacelli, del Busto, Garcia and Valentine moved in the District Court on March 1, 1973 that the verdict on Indictment 72 Cr. 664 be set aside and a new trial granted. The motion with the consent of the Government was granted by Judge Gagliardi (Pacelli App. 127-136).

Indictments 72 Cr. 664 and 72 Cr. 1319 were never retried. On April 30, 1973, Indictment 73 Cr. 330 was filed. The offenses alleged in 72 Cr. 664 and 72 Cr. 1319 were embraced in count one which charged Pacelli, Her-

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* During the course of the trial evidence was presented by Pacelli's attorney that Barry Lipsky had testified untruthfully when he stated no promises were made to him. He also had testified untruthfully on the matter of promises at the trial of Indictment 72 Cr. 664.

bert Sperling, Benjamin Mallah, Luis Valentine, Nelson Garcia, Octavio del Busto, Albert Perez and nineteen other defendants with conspiracy to violate the federal narcotics laws from January 1, 1971 to April 13, 1973.

In addition Pacelli was charged in counts two, five, six, seven, eight and nine with distributing and possessing with the intent to distribute kilogram quantities of heroin and cocaine together with other defendants on various dates during the latter part of 1971 (Pacelli App. 99-106).

On May 11, 1971 Indictment 73 Cr. 330 was superseded by Indictment 74 Cr. 441 which added two other persons as defendants and additional count against Herbert Sperling. Trial commenced on Indictment 73 Cr. 441 on June 18, 1973 before Judge Pollack and on July 6, 1973, Pacelli, at his own request, was granted a mistrial (*United States* v. *Sperling*, Dkt. 73-2363, Tr. 3645, Court's Ex. 127). The *Sperling* trial concluded on July 12, 1973 with the conviction of eleven defendants and the acquittal of five. On September 20, 1973, Indictment 73 Cr. 441 was superseded by the instant Indictment (73 Cr. 881) which deleted as defendants those convicted or acquitted in the *Sperling* case and added Catino, Fazzalari, DeFranco and Barrett as defendants. In addition, counts two and three were added charging Pacelli, Catino and Fazzalari with distributing two kilograms of heroin in September, 1971 (count two) and Pacelli, DeFranco and Fazzalari with distributing one kilogram of cocaine in December, 1971 (count three). Counts three and seven of Indictment 73 Cr. 441, which charged Pacelli with distributing a half kilogram of cocaine in May, 1971 and a kilogram of cocaine in August, 1971, were not included in superseding Indictment 73 Cr. 881.

Pacelli's argument that the dismissal of the conspiracy count of Indictment 72 Cr. 612 precluded the trial of the conspiracy count in this case is erroneous in several respects.

First, the dismissal of the conspiracy count of Indictment 72 Cr. 612 was *not* based on its similarity to the conspiracy count in Indictment 71 Cr. 614 as Pacelli claims (Pacelli Br. 11), but because of the similarity to the conspiracy count in 72 Cr. 664, which was on appeal at the time (Supplemental Record 56, 56A, 57).* Second, assuming *arguendo* that the dismissal of conspiracy count in 72 Cr. 612 was a "valid and final" judgment, *Ashe* v. *Swenson,* 397 U.S. 436, 443 (1970), vacating the conviction in Indictment 72 Cr. 664 on which the double jeopardy dismissal was based completely eradicated any claim of collateral estoppel.

Furthermore, Pacelli moved to vacate the conviction in Indictment 72 Cr. 664 and expressly consented to a mistrial on 72 Cr. 1319, the indictment which superseded Indictment 72 Cr. 612 (Pacelli App. 126). Having consented to a new trial, Pacelli waived any claim of double jeopardy on the retrial of the charges in these two indictments. *United States* v. *Tateo,* 377 U.S. 463, 467 (1964); *United States ex rel. Jackson* v. *Follette,* 462 F.2d 1041, 1053 (2d Cir.), *cert. denied,* 409 U.S. 1045 (1972); *United States* v. *Pappas,* 445 F.2d 1194, 1199-1200 (3rd Cir.), *cert. denied* as *Mischlich* v. *United States,* 404 U.S. 984 (1971).

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* The supplemental record was transmitted to the Court of Appeals on June 27, 1974 pursuant to an order signed by Walter R. Mansfield, United States Circuit Judge on that date. It consists, in part, of the motion papers of Stanley Arkin, Esq., Pacelli's attorney on Indictment 72 Cr. 612, dated October 12, 1972, by which Pacelli moved for dismissal of the conspiracy count (one) in that Indictment on the grounds of double jeopardy because of its similarity to the conspiracy count in Indictment 72 Cr. 664, (Supplemental Record 56, 56A), and the transcript of part of the proceedings before Judge Gagliardi on November 15, 1972 in which the Government consented to Pacelli's motion for dismissal of the conspiracy count of Indictment 72 Cr. 612 (Supplemental Record 57).

2. Pacelli's Claim of Former Jeopardy as to Indictment 73 Cr. 441

Pacelli argues that he was twice placed in jeopardy because the mistrial on 73 Cr. 441, the *Sperling* case, was "not for his benefit", and that he did not personally consent to it. This argument is frivolous.

On July 5, 1973, Pacelli's counsel in the *Sperling* case informed the Court that Pacelli had decided not to take the stand in his own behalf (*United States* v. *Sperling*, Dkt. 73-2363, Tr. 3242-3243). Thereafter, Judge Pollack, in order to permit Pacelli to testify on behalf of his co-defendants who indicated a desire to call him, requested an offer of proof concerning the subject matter of Pacelli's proposed testimony. Pacelli's counsel told the Court, "I am prepared to put him on the stand in that regard, your Honor, at any time." (*United States* v. *Sperling*, Dkt. 73-2363, Tr. 3514-3515). Pacelli was then called by his attorney and out of the presence of the jury, he testified, in part, as follows:

> [Mr. Balliro]: Q. Mr. Pacelli, you indicated to me your willingness and desire to testify on behalf of certain of the co-defendants in this case in the event your other cases have been disposed of?
>
> [Pacelli] A. Yes.
>
> [Balliro] Q. Or in the event there is a severance of your case or other cases from your case here?
>
> [Pacelli] A. Yes.

[Balliro] Q. Now, particularly with regard to the co-defendant Antoinette Bassi, is it your position that you would testify on her behalf were those circumstances to occur?

[Pacelli] A. Yes. If I was severed. (*United States* v. *Sperling,* Dkt. 73-2363, Tr. 3515-3516).

After cross-examination by other defense counsel as to the testimony Pacelli would offer, he was reexamined by his counsel, Mr. Balliro, as follows:

[Balliro] Q. Mr. Pacelli, did you indicate to me regardless of the consequences in any other cases or in any other actions of the Government you would still be willing to testify if this case was severed?

[Pacelli] A. Definitely, I would testify, it doesn't matter.

[Balliro] Q. We discussed the problems?

[Pacelli] A. The problems of the situation, yes, we have.

[Balliro] Q. What you were being exposed to?

[Pacelli] A. Right, we did.

(*United States* v. *Sperling,* Dkt. 72-2363, Tr. 3536-3537).

After exploring several possibilities, including a split verdict and giving Pacelli use immunity,* Pacelli's counsel agreed that Pacelli would take the witness stand and testify on the understanding that he would be severed from the case after his testimony. (*United States* v. *Sperling,* Dkt. 73-2363, Tr. 3552-3554, 3587). Thereafter, on July 9, 1973,

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* Contrary to Pacelli's contention, he neither asked for nor was granted use immunity (*United States* v. *Sperling,* Dkt. 73-2363, Tr. 3587-3589). See *United States* v. *Sperling,* 362 F. Supp. 909, 911-912 (S.D.N.Y. 1973). However, since none of the evidence used against him derived from his testimony at the *Sperling* trial, he received in effect the use immunity which he claims was granted to him.

Pacelli took the stand and gave exculpatory testimony on behalf of several of the *Sperling* defendants. (*United States* v. *Sperling*, Dkt. 73-2363, Tr. 3596-3643).

After his testimony Pacelli moved for a severance and requested that a mistrial be declared. The Government consented, and Pacelli's motion for a severance and a mistrial was granted. (*United States* v. *Sperling*, Dkt. 73-2363, Tr. 3645, Court's Ex. 127).

It is abundantly clear from the testimony recited above that Pacelli himself expressly consented to the severance and mistrial. In any event, his consent "may be implied from the totality of circumstances. . . ." *United States* v. *Goldstein*, 479 F.2d 1061, 1067 (2d Cir.), *cert. denied*, 414 U.S. 873 (1973).

Pacelli argues, however, that the mistrial was granted at the Government's request and to protect its interests because the prosecution allegedly believed that permitting him to testify was essential to sustaining the conviction of Frank and Antoinette Bassi, *Pacelli's aunt and uncle*, who were both defendants in the *Sperling* case.* Even if the Government consented to the mistrial for the reasons alleged by Pacelli, that in no way would diminish the force and significance of the fact that Pacelli himself moved for the severance and mistrial, which unquestionably served to effectuate his own desire to testify on behalf of the Bassis without any prejudice to his own defense. Notwithstanding Pacelli's claim to the contrary, this is not a situation "where a defendant's mistrial motion is necessitated by judicial or prosecutorial impropriety designed to avoid an acquittal. . . ." *United States* v. *Jorn*, 400 U.S. 470, 485 n. 12 (1971), since the Government's case against Pacelli at the *Sperling* trial was overwhelming. Rather the record af-

* The jury found Frank Bassi guilty and acquitted Antoinette Bassi.

firmatively reveals that Pacelli deliberately chose to postpone his "confrontation with society," *Id.* at 486, so that he could attempt to exculpate his co-conspirators without injuring his own interests.

II. The Substantive Counts

In addition to his conviction on the conspiracy count in the present indictment, 73 Cr. 881, Pacelli was also convicted on two substantive counts: count two, which charged Pacelli, Alfred Catino and John Fazzalari with distributing and possessing with the intent to distribute two kilograms of heroin in September, 1971 and count six, which charged Pacelli and Benjamin Mallah * with distributing and possessing with the intent to distribute two kilograms of heroin in November, 1971. Pacelli now asserts that his conviction on these two counts must be reversed on a variety of grounds. None of the claims have merit.**

1. Due Process

Relying on *North Carolina* v. *Pearce,* 395 U.S. 711 (1969), Pacelli accuses the Government of "prosecutorial vindictiveness" because the indictment below alleged two heroin counts not included in any of the previous indictments and deleted the cocaine counts which were the subject of Indictments 72 Cr. 664 and 72 Cr. 1319. The claim that the Due Process Clause forbade a trial on these two heroin offenses rests on Pacelli's belief that there is a "deep community abhorrence of heroin as compared to the sentiment about non-addictive cocaine" (Pacelli Br. at 19), which he alleges was proven below by the jury's verdict acquitting him on the counts involving cocaine.

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* Count six was dismissed as against Mallah by Judge Pollack at the close of the Government's case.

** Pacelli received concurrent 15 year terms of imprisonment on each of the three counts on which he was convicted.

There is no need, however, to determine the "sentiment" of the community about those who traffic in multi-kilogram quantities of cocaine as opposed to those who deal in heroin. Congress has decreed identical penalties for both offenses. And the record is clear that the sentence below was not greater than the one he received upon his conviction on Indictment 72 Cr. 664, even though it could have been. The requirement of due process enunciated in *Pearce*, *i.e.*, "that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial," 395 U.S. at 725, was fully satisfied here. But there is nothing in *Pearce* or any other case cited by Pacelli which forbids the inclusion of a new and different charge when a defendant is retried, especially where, as here, the old charges are no longer included and the new ones, based on wholly different conduct, do not carry any increased level of punishment.

2. Double Jeopardy

Pacelli also argues that his conviction on the substantive heroin counts "notwithstanding the technical distinctness of these offenses and those in the earlier indictments" constitutes double jeopardy (Pacelli Br. at 20-21).

The gist of Pacelli's argument evidently is that his consent to a new trial on Indictment 72 Cr. 664 and a mistrial on Indictment 72 Cr. 1319 was improperly obtained, since he would not have consented if he had known that he would be later indicted for participating in a broader conspiracy and for other substantive narcotics offenses. The argument advanced is that because the conditions under which he consented to a new trial * were

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* When Pacelli consented to the mistrial on Indictment 72 Cr. 1319 he already stood convicted on 72 Cr. 664 for which he had received a 15 year sentence. That case was then on appeal. The Government stated that if the latter conviction were affirmed

[Footnote continued on following page]

allegedly breached, the waiver of jeopardy was null and void. Based on this reasoning, Pacelli concludes that his conviction for the substantive offenses proved below was barred by the Double Jeopardy Clause.

Neither logic nor law supports this conclusion. First, Pacelli was never retried on the substantive counts alleged in Indictments 72 Cr. 664 and 72 Cr. 1319. Second, Pacelli had never been previously tried on the substantive counts upon which he was convicted below. In sum, the Double Jeopardy Clause has no applicability to Pacelli's conviction on counts two and six.*

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on appeal, Indictment 72 Cr. 1319 would be disposed of by nolle prosequi and that if 72 Cr. 664 were reversed or vacated, it would be retried along with the one substantive count of Indictment 72 Cr. 1319. The final part of the agreement was that if 72 Cr. 664 were retried with or without the substantive offense charged against Pacelli in Indictment 72 Cr. 1319 and Pacelli were convicted, the Government would urge the District Court at the time of sentence that Pacelli receive no more than 15 years, the sentence imposed on Indictment 72 Cr. 664 (Pacelli App. 121-126). Obviously then, Pacelli had nothing to lose and everything to gain by his consent to a mistrial on Indictment 72 Cr. 1319. If Indictment 72 Cr. 664 were affirmed, Pacelli would not be tried and therefore he would not be subjected to a possible additional term of imprisonment if he was convicted on 72 Cr. 1319. If 72 Cr. 664 were reversed or vacated, the charges in 72 Cr. 1319 and 72 Cr. 664 would be consolidated and he would again only face, in effect, a single conviction for which he again could not receive more than 15 years. Thus it is clear that Pacelli's consent was not conditioned, as he now claims, on an understanding that no additional charges would be filed against him. Furthermore had Pacelli not agreed to a mistrial on 72 Cr. 1319 and was acquitted on that indictment, the net effect would be that he could not have been retried on the one substantive count of 72 Cr. 1319 in which he was named as a defendant. Pacelli was not named as a defendant in count one of 72 Cr. 1319, the conspiracy count, so even if acquitted of that substantive charge, he would have in any event faced a retrial on Indictment 72 Cr. 664, if there had been a reversal.

* Pacelli's reliance on *Abbate* v. *United States*, 359 U.S. 187 (1959) and *United States* v. *Sabella*, 272 F.2d 206 (2d Cir. 1959)

[Footnote continued on following page]

As Pacelli himself concedes, Indictment 73 Cr. 441 (and the instant indictment which superseded 73 Cr. 441), is "wholly different in scope, parties [and] number of charges . . ." from the earlier indictments (Pacelli Br. at 24). Even if he had known about this indictment and had refused to consent to the mistrial in 72 Cr. 1319 and a new trial in 72 Cr. 664, there is nothing in the Fifth Amendments provision barring double jeopardy which would prohibit the Government from obtaining the "wholly different" indictment upon which Pacelli was convicted below.

3. Elementary Fairness and Speedy Trial

Pacelli also contends that the failure to include the two substantive counts on which he was convicted below in the earlier indictments barred their prosecution on grounds of elementary fairness. The argument is untenable.

It is undisputed that the offenses alleged in these substantive counts occurred after the filing of Indictment 71 Cr. 614 in June, 1971. Nor is there any basis for a claim of prejudice because these offenses were not joined in Indictments 72 Cr. 664 and 72 Cr. 1319, since Pacelli was never finally convicted on any of those charges. Following his mistrial in Indictment 73 Cr. 441, the Government unquestionably had the right to retry Pacelli. Adding the two substantive counts involving a sale of heroin to Catino and a purchase of heroin from Sperling to the substantive counts previously charged in Indictment 73 Cr. 441 did not burden Pacelli with an additional trial that might otherwise been avoided and did not result in any legally cog-

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is misplaced. Those cases involved separate prosecutions of the same criminal act. It can hardly be said that a sale of heroin to one person and a sale of cocaine to another on a different occasion constitute the *same* criminal act within the meaning of *Abbate* and *Sabella*.

nizable prejudice to him. This is not a case of repeated, sequential prosecutions designed to secure a conviction of a defendant previously acquitted. Rather, the judgment of conviction in this case represents a conclusive adjudication of charges which had never been previously resolved with finality.

Equally unfounded is Pacelli's claim that the delay in prosecuting him on the substantive counts in 73 Cr. 881 denied him a speedy trial. Aside from asserting that Lipsky's inability to recall the exact date of the transactions prevented him from presenting an alibi defense, Pacelli does not allege any special prejudice, such as an inability to locate witnesses or secure evidence. The alleged prejudice is insufficient to bar prosecution of these offenses. *United States* v. *Iannelli*, 461 F.2d 483, 485 (2d Cir.), *cert. denied*, 409 U.S. 980 (1972); *United States* v. *Scully*, 415 F.2d 680, 683 (2d Cir. 1969); *United States* v. *Capaldo*, 402 F.2d 821, 823 (2d Cir. 1968), *cert. denied*, 394 U.S. 989 (1969).

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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JAMES P. LAVIN,
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AFFIDAVIT OF MAILING

State of New York)
: ss.:
County of New York)

JAMES P. LAVIN being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 1st day of JULY, 1974 he served a copy of the within SUPPLEMENTAL BRIEF (2) by placing the same in a properly postpaid franked envelope addressed:

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NANCY ROSNER, ESQ.,ROSNER,FISHER & SCHRIBNER,401 BROADWAY NY,NY 10013
ROBERT MITCHELL, ESQ., 51 CHAMBERS ST.,NY,NY

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing inside the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

James P. Lavin
JAMES P. LAVIN

Sworn to before me this
1st day of July, 1974.

Ralph I. Lee

RALPH I. LEE
Notary Public, State of New York
No. 41-2292838 Queens County
Term Expires March 30, 1975